ALEXANDER L
CLERK

NO. 80 - 1634

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE PEOPLE OF THE STATE OF NEW YORK,
Petitioner,

vs.

RONALD ONOFRE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

The respondent was arrested on February 23, 1977 on a felony complaint of sodomy. At his own request, he voluntarily testified (without any grant of immunity) before the Grand Jury of Onondaga County on April 28, 1977. He testified that in November and December, 1976, that he and the complainant had mutually and consensually engaged in oral and anal sex in home of the respondent. (R-22)

On April 29, 1977 the Grand Jury charged respondent (Indictment No. 77-181-1) with violating Penal Law Section 130.50 (1) (Sodomy in the 1st degree), Penal Law Section 130.65 (1) (Sexual abuse in the 1st degree), Penal Law Section 130.38 (Consenual sodomy) and Penal Law Section 130.55 (Sexual abuse in the 3rd degree) alleging that respondent forcibly compelled the complainant to engage in oral and anal sex on February 2, 1977. (R-34)

The respondent entered a plea of not guilty to these charges.

The People in their brief make reference to the fact that a friend of the complainant alleged he was "retarded". This individual was a layperson and there was no medical proof to establish this. The indictment did not allege that the sodomy was committed by virtue of the complainant's inability to consent. This issue was not raised in the indictment, nor in Court at the admission and sentencing proceedings. In addition, they attempt to allege the respondent waived his constitutional rights by showing one senior assistant district attorney some photographs which verified that the relationship was consensual. The photographs were used only to confront the complainant, at which point the complainant finally told the truth. The public had no access to these materials (except for efforts to the District Attorney's office to publicize them). The People agreed at the time of the admission that these acts were carried out in seclusion, and did not raise the issue of waiver at the Trial Court level.

After an extensive post-indictment investigation, the complainant, who is the alleged victim in the case, recanted the allegation of force: he admitted that he had lied in his initial complaint to the police, he admitted that he had lied to the Grand Jury, and acknowledged that the sexual relations he had with the respondent were completely consensual and voluntary. (R-59)

As a result of these admissions, the District Attorney's Office moved to dismiss the counts of forcible sodomy and sexual abuse. That motion was granted by the Trial Court by order dated October 4, 1978. (R-58)

In September, 1977, the respondent moved to dismiss the remaining count of the indictment, consensual sodomy, on the grounds that the statute constituted an invasion of his constitutionally protected right to privacy and denied him equal protection of the law. The Attorney General of the State of New York was served with notice of his constitutional challenge (pursuant to the Executive Law) but declined to appear in the proceeding. (R-46, 47)

By memorandum decision dated October 4, 1978, the County Court (Gale, J.) sustained the constitutionality of the statute.

On October 18, 1979, the District Attorney moved to amend the indictment to change the date of the acts charged from February 2, 1977 to November, 1976. The respondent then admitted the truth of the facts charged in the remaining count : that in November he had engaged in consensual sodomy in his own home with the complainant.He was then convicted by the Court (without jury) of violating Section 130.38 of the Penal Law and sentenced to a conditional discharge of one year .(R66-70)

A Notice of Appeal from the conviction was filed on October 19,1978.

The Appellate Division Fourth Department reversed on the law on January 24,1980, and the Court of Appeals affirmed by decision dated December 18,1980.

POINT I

The Court of Appeals has properly determined that the right to privacy extends to private acts of consensual sodomy.

While the Court's initial enunciation of the specific right to privacy was based upon the protection of the marriage relationship as set forth in Griswold v. Connecticut,381 U.S.479 (1965), the Court has also recognized a more general right to privacy (as noted in Eisenstadt v. Baird, 405 U.S.438 1972)), the articulation of which was set forth in Roe v. Wade, 410 U.S. 113 (1973),wherein the Court commented:

> Appellant would discover this right in the concept of personal 'liberty' embodied in the Fourteenth Amendment's Due Process Clause; or in personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its penumbras, see Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972); Id. at 460 (White, J., concurring in result); or

> among those rights reserved to the people by the Ninth Amendment, Griswold v. Connecticut, Id. at 486 (Goldberg, J., concurring). Id. at 129.

Thus, Roe acknowledged the establishment of a constitutional protection allowing individuals to make decisions concerning their body and well-being, and to be free from unwarranted governmental regulation therein. In the companion case of Doe v. Bolton, 410 U 179 (1973), Mr. Justice Douglas in his concurring opinion describes the right of privacy as protecting "freedom of choice in basic decisions of one's life...." Id. at 211.

Shortly thereafter in Carey v. Population Services, 431 U.S. 67 (1976), the Court reviewed the history of the right to privacy , and stated :

> Although the Constitution does not explicitly mention any right of privacy the Court has recognized that one aspect of the 'liberty' protected by the Due Process Clause of the Fourteenth Amendment is a right of personal privacy, as a guarantee of certain areas or zones of privacy. Roe v. Wade, 410 U.S. 113, 152 (1973). This right of personal privacy includes the interest in independence in making certain kinds of important decisions, Whalen v. Roe, 429 U.S. 589, 599-600 (1977).

Thus while the first specific recognition of the right to privacy set forth in Griswold, supra, centered or the recognition of the marriage relationship and the use of contraceptives these later decisions of the Court set forth other areas or zones of the right of privacy. The Court of Appeals properly determined that these other areas, which constitute zones of privacy are matters as fundamental as the decisons about childbearing and procreation in that consensual, voluntary sexual acts in a relationship between adults are a basic part of many adults lives. As the Appellate Division noted, sex may be a transcendental part of one's life. Contrary to the assertions of the District Attorney the foundation of the area protected by the previous decisions of this Court and the New York Courts is the freedom of an adult to engage in an intimate relationship, which may include voluntary consensual homosexual acts. The New York State Court of Appeals properly recognized this aspect of the right of privacy in following the decisions of this Court.

POINT II

The Court of Appeals has properly determined that the right to engage in voluntary sexual acts in the privacy of one's home is constitutionally protected.

The respondent in the case at bar had been charged with committing a deviant sexual act with another consenting adult in the privacy of his own home. The New York State Court of Appeals found that such a charge violates the protected sanctity of the individual in his own home. As was noted by Boyd v. United States, 116 U.S.616 (1886), this Court has long protected the "sanctity of a man's home and the privacies of life". Id. at 630. Thus,in Stanley v. Georgia, 394 U.S. 557 (1969) , the Court held that in addition to a First Amendment right "to receive information and ideas there is a fundamental right to be free from unwarranted governmental intrusion into the privacy of the home." Id. 564. Thereafter in United States v. Orito, 413 U.S. 139, (1973), the Court emphasized:

> The Constitution extends special safeguards to the privacy of the home,just as it protects other special privacy rights such as those of marriage, procreation,motherhood, child-rearing and education. Id. at 142.

The Court noted:

> It is hardly necessary to catalog the myriad activity that may be lawfully conducted within the privacy and confines of the home, but may be prohibited in public. Id. at 142,143.

This concept was recently emphasized by the Court in Payton v. New York, 40 CCH S. Ct. Bull. 1591 (1980):

> The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined than when the unambiguous physical dimensions of an individual's home - a zone that finds roots in clear and specific constitutional terms: "The right of the people to be secure in their... houses...shall not be violated." That language unequivocally establishes the proposition that "[a]t the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." Silverman v. United States, 365 U.S. 505, 511. Id. at 1608

As Payton v. New York, supra, reflects the home provides to the individual special protections, and provides a place where the State cannot intrude in its concern to uphold public morality. The respondent's consensual acts of sodomy in the privacy of his home cannot be found to have negatively affected the surrounding community since society had no knowledge of the acts and the respondent took no steps to publicize them. Thus the Court of Appeals properly determined that the conduct of respondent in his own home is constitutionally protected.

POINT III.

The Court of Appeals has properly determined that there is no justifiable state interest in the consensual sodomy statute.

The New York Courts properly found that while the State may protect the interests of the public in moral issues in matters which have an objective impact upon the public, it may not delve into the morality involved in a purely private relationship. In the obscenity cases this Court noted in United States v. Orito, supra, "it is hardly necessary to catalog the myriad activities that may be lawfully conducted within the privacy and confines of the home but which may be prohibited in public". Id. at 142,143.Conversely in Stanley v.Georgia supra, the Court commmented: "As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home." Id at 568.

Thus a morality shared even by a majority is not sufficient to justify the consensual sodomy law. The conduct itself is not evil, as is demonstrated by the fact that married couples are not proscribed from engaging in such conduct. In an instance when both participants engage voluntarily in the conduct, there can be no harm to either the participants, nor to the community. Inasmuch as there is no harm to the public nor to the participants, the individuals have a reasonable expectation that their conduct will be protected by their right to privacy, and the State should not be permitted to interfere in their relationship.

As the Appellate Division noted in its decision: "Curtailing activity which offends the public is a legitimate State interest but the standard to be applied is the effect that the behavior might have on a reasonable person, not the most sensitive member of the community. Conduct which is carried out in an atmosphere of privacy between two consenting parties by mutual agreement has litle likelihood to offend a public not embarked on eavesdropping." Id. at 271.

The Court of Appeals in its decision found that there had been no harm to the public and in consequence of that fact, there is no valid basis for state intervention . Thus while the State may prohibit acts which involve violence, or lack of consent, or which occur in public (all of these acts being proscribed by other statutes for all individuals whether married or unmarried,

heterosexual or homosexual), the New York Courts properly determined that the prohibition involved in Section 130.38 of the Penal Law is impermissible. Indeed the Temporary Commission on Revision of the Penal Law and Criminal Code concluded : "It would appear that the Legislature's decision to restore the consensual sodomy offense was, as with adultery, based largely upon the premise that deletion thereof might obstensibly be construed as legislative approval of deviate conduct" (New York Legislative Annual, 1965,pp.51-52).

POINT IV

The Court of Appeals has properly determined that the consensual sodomy law violates Respondent's right to equal protection under the law

The consensual sodomy statute differentiates between the acts of married and unmarried individuals who engage in the same sexual acts. It is not the act itself which the State seeks to regulate, but rather the State seeks to arbitrarily regulate those who may engage in the sexual acts. Unmarried individuals, whether heterosexual or homosexual, are prohibited from engaging in certain sexual acts,described by statute as being "deviant".

In Eisenstadt v. Baird, supra, the Court noted that the starting point for analysis under the Equal Protection Clause is "whether there is some ground of difference which rationally explains the different treatment accorded married and unmarried persons" under the

statute. Id. at 450. Holding that no conceivable purpose justified the differential treatment afforded married and unmarried people, the Court observed:

> It is true that in Griswold the right of privacy in question inhered in a marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional make-up. If the right of privacy means anything, it is the right of the individual, married or single to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child. Id. at 453. (Emphasis supplied).

The State justification for the statute, to regulate morals or prevent possible physical harm does not have any relationship to the legislation. Equal protection prohibits a classification which affects a group of citizens which "rests on grounds wholly irrelevant to the achievement of the State's objective" (McGowan v. Maryland, 366 U.S. 420 (1961). Thus, in United States Department of Agriculture v. Morino, 413 U.S. 528 (1973), Mr. Justice Douglas noted in his concurring

opinion:

> The requirement of Equal Protection denies government the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of the enactment. Reed v. Reed, 404 U.S. 71. Id. at 540,541.

POINT V

The Court of Appeals has properly extended the right of privacy to voluntary consensual acts between adults.

Although this Court has not specifically extended the right to privacy to consensual homosexual sexual acts,the New York Court of Appeals has properly made such a determination, and this Court should permit that determination to stand. This Court and the New York Court of Appeals have recognized the right of the State to grant further protection to its citizens than is granted under the Federal Constitution. Thus, in Oregon v. Hass, 420 U.S. 714 (1977) at 719, and Cooper v. California, 386 U.S. 58 (1967) at 62 , this Court reaffirmed the principle that a state is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon Federal Constitutional standards. See, e.g., Sibron v. New York, 392 U.S.

40, 60-61 (1968),see also State v. Kaluna, 55 Haw. 361, 368-369, 520 P 2d 51, 58-59 (1974).

The Court of Appeals has previously applied this principle in Cooper v. Morin, 49 N.Y. 2d 69, (1979), wherein the Court stated:

> We have not hesitated when we concluded that the Federal Consitution as interpreted by the Supreme Court fell short of adquate protection for our citizens to rely upon the principle that that document defines the minimum level of individual rights for its citizens through its Constitution, statute or rule-making authority (Sharrock v. Dell Buick-Cadillac, 45 N.Y. 2d 152, 159-161; People v. Isaacson, 44 N.Y. 2d 511, 579-520; People v. Hobson, 39 N.Y. 2d 479, 483-484; People v. Arthur, 22 N.Y. 2d 325, 328-329; and see Howard, State Courts and Constitutional Rights in the Day of the Burger Court, 62 Va. L. Rev. 873; Brennan, State Constituions and the Protection of Individual Rights, 90 Harv. L.R. 489)." Id. at 79.

From these authorities it is clear that the New York State Court of Appeals properly can grant its citizens greater protection under its intreperation of the Constitution than the same citizens would receive under the mandates of the Federal Courts.

CONCLUSION

The petition for certiorari should be denied.

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